A

PP

v.

NOLOSE ALBERT RALESHOME

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
SURIYADI HALIM OMAR FCJ
HASAN LAH FCJ
C RAMLY ALI FCJ
[CRIMINAL APPEAL NO: 05-327-12-2013(W)]
1 OCTOBER 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) -*
D *Trafficking in 707.5g methamphetamine - Homogenisation of substance - Whether substance homogenised before or during analysis - Material contradiction between chemist's oral evidence and chemist report - Interpretation of words used - Whether prosecution could rely on chemist's oral testimony*

E

EVIDENCE: *Expert evidence - Chemist report - Material contradiction between chemist's oral evidence and chemist report - Interpretation of words used - Whether words employed in chemist report affected propriety of whole report when viewed against oral testimony - Whether prosecution could rely on chemist's oral testimony*

F

The respondent was charged in the High Court for an offence of trafficking in 707.5g of methamphetamine ('the substance'), an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The respondent was found guilty and sentenced to
G death. On appeal, the Court of Appeal held that the oral evidence of the chemist ('PW3') was materially contradicted by her chemist report ('P9') whereby in her oral evidence, PW3 said that she had homogenised the substance before analysis but in P9, she had reported that the substance was homogenised during analysis. In
H allowing the respondent's appeal, the Court of Appeal was of the view that the oral testimony of PW3 was irreconcilably in conflict with her chemist report, which had the effect of rendering the respondent's conviction unsafe. Dissatisfied, the prosecution appealed to this court. The prosecution argued that from the oral
I evidence of PW3, it was clear that the substance was homogenised before PW3 carried out the test. It was further submitted that in

P9, the words 'Bahan tersebut di atas telah dijadikan serbuk yang homogen semasa dianalisis' had the meaning that the substance was already homogenised when analysed. However, the respondent argued that P9 could also be interpreted as if the substance was homogenised during the analysis itself.

Held (allowing appeal; setting aside decision of Court of Appeal)
Per Raus Sharif PCA delivering the judgment of the court:

(1) It is not necessary for a chemist, whilst testifying in court, to state in *verbatim* the contents of the chemist report or to state that homogenisation was done before the analysis. On the facts, PW3 had clearly stated in her oral testimony that the substance sent to her for analysis had been homogenised before the analysis was done. (para 28)

(2) A reasonable conclusion as to what was written by PW3 in P9, *ie*, 'Bahan tersebut di atas telah dijadikan serbuk yang homogen semasa dianalisis' must be taken to mean that the substance was homogenised before the test was carried out. The word 'telah' (already) in P9 supported PW3's oral evidence that the substance was homogenised before the test was carried out. The words employed in P9 did not affect the propriety of the whole report when it was viewed against the testimony of PW3 (*Muhammed Hassan v. PP*; refd). (paras 23 & 27)

(3) The Court of Appeal had erred in evaluating the oral evidence of PW3 by laying too much emphasis on P9 and overlooking the testimony of PW3. With the oral evidence, P9 was nothing more than corroborative evidence which affirmed the oral testimony of PW3 that she had examined and analysed the suspected materials and found them to be dangerous drugs under the DDA. In such instance, the oral testimony of PW3 would constitute the best evidence which the prosecution may rely upon. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah dituduh di Mahkamah Tinggi bagi kesalahan mengedar 707.5g methamphetamine ('bahan tersebut'), satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Responden didapati bersalah dan dijatuhkan hukuman mati. Atas rayuan, Mahkamah Rayuan memutuskan bahawa

keterangan lisan ahli kimia ('PW3') adalah bercanggah dengan laporan kimianya ('P9') di mana dalam keterangan lisannya, PW3 menyatakan bahawa dia telah menghomogenkan bahan tersebut sebelum menjalankan analisis tetapi dalam P9 pula, dia telah melaporkan bahawa bahan tersebut dihomogenkan semasa analisis. Dalam membenarkan rayuan responden, Mahkamah Rayuan berpendapat bahawa keterangan lisan PW3 bercanggah dengan laporan kimianya, yang menyebabkan sabitan responden tidak selamat. Tidak berpuas hati, pihak pendakwaan merayu ke mahkamah ini. Pihak pendakwaan menghujahkan bahawa daripada keterangan lisan PW3, adalah jelas bahawa bahan itu telah dihomogenkan sebelum PW3 menjalankan ujian. Dihujahkan lagi bahawa dalam P9, perkataan 'Bahan tersebut di atas telah dijadikan serbuk yang homogen semasa dianalisis' mempunyai makna bahawa bahan itu telah pun dihomogenkan semasa dianalisis. Walau bagaimanapun, responden menghujahkan bahawa P9 boleh juga ditafsirkan sebagai bahan itu dihomogenkan semasa analisis.

Diputuskan (membenarkan rayuan, mengenepikan keputusan Mahkamah Rayuan)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Ahli kimia tidak perlu, semasa memberi keterangan di mahkamah, menyatakan secara *verbatim* kenyataan daripada laporan kimia atau pun menyatakan bahawa homogen telah dibuat sebelum analisis. Berdasarkan fakta, PW3 telah menyatakan dengan jelas dalam keterangan lisannya bahawa bahan yang dihantar kepadanya untuk analisis telah dihomogenkan sebelum analisis.

(2) Kesimpulan munasabah berkenaan apa yang ditulis oleh PW3 dalam P9, iaitu, 'Bahan tersebut di atas telah dijadikan serbuk homogen semasa dianalisis' mesti ditafsir bahawa bahan tersebut telah dihomogenkan sebelum ujian dijalankan. Perkataan 'telah' dalam P9 menyokong keterangan lisan PW3 bahawa bahan tersebut telah dihomogenkan sebelum ujian dijalankan. Perkataan yang digunakan dalam P9 tidak menjejaskan kewajaran keseluruhan laporan tersebut apabila dirujuk terhadap keterangan PW3 (*Muhammed Hassan v. PP*; dirujuk).

(3) Mahkamah Rayuan terkhilaf dalam menilai keterangan lisan PW3 dengan memberi penekanan pada P9 dan tidak mengendahkan keterangan PW3. Dengan keterangan lisan, P9

adalah keterangan sokongan yang mengesahkan keterangan lisan PW3 bahawa dia telah menguji dan menganalisa bahan yang disyaki dan mendapati bahawa ia adalah dadah berbahaya di bawah ADB. Dalam keadaan ini, keterangan PW3 adalah keterangan terbaik di mana pendakwaan boleh bergantung terhadapnya.

Case(s) referred to:
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 399
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2)

For the appellant - Awang Armadajaya Awang Mahmud (Kee Wei Lon with him); DPPs
For the respondent - Ramkarpal Singh (Sangeet Kaur Deo & Zaleha Al-Hayat with him); M/s Karpal Singh & Co

[Editor's note: For the Court of Appeal judgment, please see Nolose Albert Raleshome v. PP [2014] 2 CLJ 903.]

Reported by Kumitha Abd Majid

JUDGMENT

Raus Sharif PCA:

Introduction

[1] The respondent was charged in the High Court Kuala Lumpur for an offence of trafficking in dangerous drugs, to wit, 707.5g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act ("DDA").

[2] On 11 January 2013, the High Court found the respondent guilty of the said charge and sentenced him to death. On 9 December 2013, the Court of Appeal allowed the respondent's appeal. The respondent was acquitted and discharged.

[3] We heard the appeal by the Public Prosecutor against the decision of the Court of Appeal on 10 July 2014. After hearing the parties, we allowed the appeal. The decision of the Court of Appeal was set aside, and we reinstated the decision of the High Court. We now give our reasons.

A

The Facts

[4] The relevant facts and the issues raised in this appeal are these. On 30 December 2010 at about 11am a team of police officers led by Inspector Shamsul bin Musa ("PW7") acting on
B information received, conducted an operation in relation to drugs related offences at Taman Connaught Cheras (target area). The target was a Proton Gen 2 car bearing registration No. WMX 9669 ("Gen 2 car").

C **[5]** The police team arrived at the target area at about 11.30am. Not long after that PW7 found the Gen 2 car parked in front of the Alliance Bank. There was no one inside the Gen 2 car. PW7 then directed his team to carry out surveillance at the vicinity of the Gen 2 car. PW7 positioned his car 15 metres behind the Gen 2 car.
D

[6] At about 12.15 noon, PW7 was alerted by one of his men that a male of African descent (respondent) was seen carrying a black bag and heading towards the Gen 2 car. PW7 then saw the respondent getting into the Gen 2 car and was carrying a black
E bag. When the Gen 2 car started to move, PW7 and his team trailed the Gen 2 car until Taman Len Seng. As the Gen 2 car was entering into the vicinity of Taman Len Seng food court, PW7 intercepted the Gen 2 car. The respondent stopped, got off from the target car and fled. PW7 and his team followed in pursuit
F and soon after, the respondent was apprehended.

[7] PW7 conducted a body search on the respondent and recovered the car key from the respondent's front trouser pocket. PW7 brought the respondent to the Gen 2 car. Using the car key
G recovered from the respondent, PW7 opened the Gen 2 car door and retrieved a black bag ("P15") which contained a black package. Subsequently when the black package was opened, PW7 found in it substances suspected to be dangerous drugs.

H **[8]** The package containing the substances suspected to be dangerous drugs was then sent to the chemistry department for chemical examination and analysis. The substances in the package were later confirmed by the chemist, Muzaiyanah binti Mohd Kaprawi (PW3) to contain 707.5g methamphetamine, a dangerous drug under the DDA.
I

At The High Court

[9] The High Court at the end of the prosecution's case found that the prosecution had succeeded in proving a *prima facie* case against the respondent and ordered the respondent to enter for his defence. The respondent in his defence utterly denied the events that led to his arrest. Respondent's version was that on 30 December 2010 at about 10am he was in his rented car Gen 2 in front of Alliance Bank waiting for Asmawati binti Abu Bakar ("Asmawati"). Asmawati is the girlfriend of his Nigerian friend named Kenneth. According to the respondent, Kenneth had asked him to lend the Gen 2 car to Asmawati for the day and at the material time he was waiting for Asmawati to take the car.

[10] The respondent further testified that Asmawati arrived at about 10.20am to 10.30am carrying a backpack (P15). When she first entered the car, she placed P15 on her lap but later she placed it behind the seat where she was sitting on. The respondent further explained that at the material time he was driving back to Pandan Perdana, so that Asmawati could drop him off and leave the car with her. However, when he drove off from Alliance Bank, he received a telephone call from his school asking him to collect his passport. Since he was just around the corner, he stopped in front of KK Mart and gave the car to Asmawati.

[11] According to the respondent, when he got off the car, he then walked to the bus stop. While he was at the bus stop for about 10 to 15 minutes, the police came and arrested him. After his arrest, he was taken to the Chinese food court where police showed him the bag P15. He was questioned about P15 by police, but he informed the police that P15 belonged to Asmawati.

[12] The High Court rejected the respondent's story. The High Court also found that the defence had failed to raise any reasonable doubt against the prosecution's case. In short the learned judge was satisfied that the respondent was in possession of the dangerous drug and he was in possession for the purpose of trafficking the said drug.

At The Court of Appeal

[13] The Court of Appeal in reversing the decision of the High Court did so only on one ground. This can be seen from the grounds of judgment of the Court of Appeal that, *inter alia*, stated:

A [10] In the petition of appeal, the appellant attacked the judgment of the learned High Court on a number of grounds. What turned out to be of critical importance in the course of the arguments before this court is the ground that the conviction of the appellant is unsafe for the reason that the prosecution has failed to prove one of the essential ingredient of the charge, namely that the substance was methamphetamine weighing 707.5g. This is the focus of our judgment.

[14] The Court of Appeal then went further to state that:

C Mr. Karpal Singh, learned counsel for the appellant argued that the learned High Court Judge erred in not concluding the evidence of PW3, the Chemist was not credible. This is because the substance sent to her for analysis had been homogenised into powder during analysis, when clearly, homogenisation had been conducted on the substance before analysis. Learned counsel D further argued that the oral evidence of PW3 is materially contradicted by her own chemist report and that the learned High Court Judge has failed to take into account this material contradiction. He then argued that this is a serious non-direction which amounts to a misdirection.

E **[15]** After narrating the learned Deputy Public Prosecutor's response to Mr. Karpal Singh's submission, the Court of Appeal went on to decide that:

[12] On the facts of the present case, we find there is much force F in Mr. Karpal Singh's argument. Now, in accordance with the provisions of section 180(1) and (4) of the Criminal Procedure Code (CPC), it is the duty of trial court to undertake a maximum evaluation of the credibility and reliability of all the evidence adduced so as to determine whether each and essential ingredients of the offence has been established, in order to make finding G whether or not the prosecution has made out a *prima facie* case against the accused (see *Lim Pah Soon v. PP* [2013] 6 MLJ 252). Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected (see *PP v. Ong* H *Cheng Heong* [1998] 4 CLJ 209 and *PP v. Mok Kar Poh* [2001] 5 CLJ 206).

[13] In the context of the present case, one of the essential ingredients of the offence which the prosecution must prove is that the substance in question is in fact methamphetamine I weighing in total 707.5 grammes. This then brings into focus the evidence of PW3. In this regard, the material part of the evidence of PW3 in examination-in-chief is as follows:

Ujian - Saya telah menjadikan bahan Kristal jernih ini sebagai serbuk yang homogenasi dan kemudian saya telah menjalankan 2 analisa iaitu:

1. Analisa kualitatif - terdiri daripada 2 ujian:

(a) Ujian warna menggunakan bahan uji marquis dan bahan uji simon. Ujian ini memberi warna oren dan biru. lni menunjukkan bahawa terdapat jenis Methamphetamine dalam bahan yang diterima;

(b) Ujian menggunakan peralatan Bas Chromatography Mass Spectometry (GCMS). Hasil analisis ini saya mengesahkan bahawa bahan diterima mengandungi Methamphetamine.

2. Ujian kuantitatif untuk menentukan berat dadah Methamphetamine. Hasil daripada timbangan dan analisa, saya dapati bahawa bahan Kristal ini mengandungi 707.5 gram Methamphetamine.

Semua ujian ini disyorkan oleh United Nations.

The important point that came out of PW3's evidence in examination-in-chief, as highlighted above, is that she had homogenised the substance before she carried out the analysis of the substance in question.

[14] It is significant to note that in the course of giving evidence in her examination-in-chief, PW3 tendered the chemist report which she had prepared and signed. This document was marked as exhibit P9. We will say more about exhibit P9 later in this judgment. At this juncture, it is important for us to refer to the evidence of PW3, where under cross-examination she tendered the UN Guidelines which was marked as exh. D1. In accordance with the UN Guidelines, under cross-examination PW3 emphasised the importance of homogenising the substance before analysis. This is made clear in the following excerpt of PW3's testimony:

Sebelum analisis, bahan perlu dihomogen dulu. Bukan semasa. Ya, menurut UN Guidelines, proses homogenisation tidak boleh dibuat semasa analisis.

Ya, apa yang dalam UN Guidelines adalah sedang untuk diikuti. Sahkan dalam keterangan saya telah menghomogen bahan sebelum buat analisis. Setuju, mesti sebelum dan tidak boleh semasa analisis.

A [15] Again, in re-examination, PW3 reiterated that homogenization must first be done before analysis. In the words of PW3 in re-examination:

> Setelah buat timbangan kasar dan mendapat nilai kasar besar bahan, saya telah menjadikan bahan menjadi homogen sebelum buat analisis.

B

[16] Based on the above reasoning, the Court of Appeal concluded by holding:

C [17] In our view, clearly, the oral evidence of PW3 is materially contradicted by her own chemist report, exh. P9. In her oral evidence, she said she had homogenised the substance before analysis, whereas in exh. P9, she stated that the substance was homogenised during analysis. Exhibit P9 is a document required by law to be in writing. More than that, as we have emphasised
D earlier, PW3 is bound to state the truth in exh. P9. That being the case, PW3 must be presumed to have stated the truth in exh. P9 that the impugned substance had been homogenised into powder during analysis. In this regard, the learned High Court judge had failed to evaluate and scrutinise the evidence of PW3 in the light of this glaring and material contradiction. We have
E carefully and anxiously considered the entirety of the evidence of PW3 on this critical issue. In view of the unsatisfactory feature, it is difficult for this court to conclude with any degree of certainty that PW3 had homogenised the substance before analysis, as required by the UN Guidelines. PW3's evidence was
F not satisfactorily adduced in this case.

[18] In any drug trafficking case, the evidence of the chemist as an expert witness must be satisfactorily and adequately adduced to prove that the impugned drug is a 'dangerous drug' as defined in the DDA. In this regard, it is of utmost important that when
G testifying in court as well as writing report, chemist must be meticulous and precise in the use of words, particularly in a case that attracts the mandatory death penalty (see: *Public Prosecutor v. Ang Soon Huat* [1991] 1 MLJ 1 and *Public Prosecutor v. Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196). This contradiction
H assumes greater importance as PW3's evidence is essential to prove that the impugned subject matter is methamphetamine weighing in total 707.5g. The whole prosecution case centered around the evidence of PW3 before the High Court pertaining to this essential element of the charge against the appellant. On account of the infirmities and poor quality of PW3's evidence,
I there is doubt about her analyses. This is fatal to the prosecution's case; it has the effect of striking at the very essence of the prosecution's case.

[17] It is apparent from the above that the main issue which was considered by the Court of Appeal was in relation to the evidence of the chemist, PW3 that was found to be wanting. In short the Court of Appeal was of the view that the oral evidence of PW3 was materially contradicted by her chemist report, P9. According to the Court of Appeal, PW3 in her oral evidence said that she had homogenised the substance before analysis, but, in exh. P9, she had reported that the substance was homogenised during analysis. Thus, the Court of Appeal was of the view that the oral testimony of PW3 was irreconcilably in conflict with her chemist report, which had the effect of rendering the conviction by the trial judge unsafe, warranting an appellate interference.

[18] In order to appreciate the Court of Appeal's reasoning, it is necessary to reproduce the chemist report (P9) prepared by SP3 that was as follows:

> Saya Muzaiyanah Mohd Kaprawi, Ahli Kimia dalam Perkhidmatan Kerajaan Malaysia dengan ini memperakui bahawa pada jam 1206 pada 18 Januari 2011 telah diserahkan kepada saya oleh INSP MOHD TAHZIR BIN HUSAIN satu sampul surat bertanda "TH" dan bermeterai "POLIS DI-RAJA MALAYSIA 422". Saya telah memeriksa sampul surat "TH" dan mendapati di dalamnya satu balutan kertas karbon diperkuat pita pelekat bertanda "TA" berisi satu kertas sampul diperkuat dengan pita pelekat bertanda "TB" mengandungi satu bungkusan plastik yang diperkuat pita pelekat bertanda "TC". Bungkusan plastik ini mengandungi 995.2 gram (berat bersih) bahan Kristal jernih. Setelah dianalisis saya mendapati bahan tersebut mengandungi 707.5 gram methamphetamine.
>
> Bahan tersebut di atas telah dijadikan serbuk yang homogen semasa dianalisis. Selepas itu bakinya dimasukkan ke dalam paket plastik berasingan (dibekalkan oleh saya) dan ditandakan dengan Nombor Makmal yang tersebut di atas. Methamphetamine adalah disenaraikan dalam Jadual Pertama Akta Dadah Berbahaya 1952.

[19] The point in contention in the report is the statement which reads: "Bahan tersebut di atas telah dijadikan serbuk yang homogen semasa di analisis".

[20] Before us, learned Deputy Public Prosecutor submitted that there were no discrepancies between the oral evidence of the chemist (PW3) and the chemist report (P9). He first referred to us the oral evidence of PW3 during cross-examination that reads as follows:

A Sebelum analisis, bahan perlu dihomogen dulu. Bukan semasa. Ya, menurut UN Guidelines, process homogenisation tidak boleh dibuat semasa analisis.

Ya apa yang dalam UN Guidelines adalah sedang untuk diikuti. Sahkan dalam keterangan saya telah menghomogen bahan sebelum
B buat analisis.

Setuju, mesti sebelum dan tidak boleh semasa analisis.

[21] It was submitted by learned Deputy Public Prosecutor that from the oral evidence of PW3, it was clear that the substance
C was homogenised before PW3 carried out the test. He went on further to submit that in P9 the words "Bahan tersebut di atas telah dijadikan serbuk yang homogen semasa dianalisis" has the meaning in English that "The substance was already homogenised when analysed." His emphasis was on the word "telah" (already).
D

[22] Learned counsel for the respondent argued otherwise. In gist he supported the reasoning of the Court of Appeal and submitted further that P9 which was prepared by PW3 gave two possible interpretations. Firstly, as interpreted by the learned Deputy Public
E Prosecutor. Secondly, it could be interpreted that the substance was homogenised during the analysis itself. He laid emphasis on the word "semasa dianalisis." Thus, he argued that when there are two possible interpretations, the interpretation that supports the defence or favourable to the defence should be adopted.
F

[23] With respect, we are unable to agree with the submissions by learned counsel. The submissions might be correct if P9 was the only evidence against the respondent. However, this is not the situation in this case. In this case, we have the oral testimony of
G the PW3 who testified that: "Ujian. Saya telah menjadikan bahan Kristal jernih ini sebagai serbuk yang homogenasi dan kemudian saya menjadikan dua analisa ..." (Translation: "Test. I have made the clear crystals as homogenised powder and then I carried out two analysis ..."). Thus we agree with the learned Deputy Public
H Prosecutor's submission that, a reasonable conclusion as to what was written by PW3 in P9: "Bahan tersebut di atas telah dijadikan serbuk yang homogen semasa di analisis" must be taken to mean that the substance was homogenised before the test was carried out. The word "telah" (already) in P9 supported the oral evidence
I of PW3 that the substance was homogenised before the test was carried out.

[24] Thus, and with the greatest of respect we find that the Court of Appeal had erred in its approach in evaluating the oral evidence of PW3 by laying too much emphasis to P9 alone and overlooking the testimony of PW3. We are of the view that with the oral evidence of PW3, P9 was nothing more than corroborative evidence affirming the oral testimony of PW3 that she had examined and analysed the suspected materials and found them to be dangerous drugs under the DDA. The oral testimony of PW3 in such instance would constitute the best evidence which the prosecution may rely upon.

[25] To this end we would like as a matter of illustration refer to the decision of this court in *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170; [1998] 2 MLJ 273 where this court had the occasion of considering a similar issue on the chemist report and the oral evidence of the chemist who testified in court. The pertinent issue in that case was that the chemist evidence was inadequate to prove that the subject matter of the charge was cannabis. The chemist in that case testified the types of test he had conducted on the plant materials that he had analysed. However, that part of the information was not stated in his chemist report in P11 that was admitted in court pursuant to s. 399 of the Criminal Procedure Code ("CPC"). Counsel for the appellant in that case argued that, the prosecution having relied on s. 399 of the CPC cannot call the chemist to testify on the four tests which he had conducted as they were not stated in his report in P11. His Lordship Chief Judge of Sabah and Sarawak Chong Siew Fai (as he then was) remarked the following:

> With respect, we did not consider that the prosecution was precluded from calling PW3, the chemist (the maker of the report exh P11), to prove its case in the ordinary way solely because it had served a copy of the report on the accused prior to the commencement of the trial pursuant to s. 399(1) of the CPC. In other words, service of a copy of the report on the accused pursuant to the said s. 399(1) is, in itself, bar to the prosecution from subsequently calling the maker of the report as a witness instead of relying on production of the report as substantive evidence. Section 399(1) merely renders permissible the admission in evidence the reports of the categories of persons set out in sub-s (2) thereof (PW3 belonged to one of such categories) without calling the makers as witnesses provided that the precondition of service of copies of the reports as laid down in the said s. 399(1) had been duly complied with. It merely enables the report to be used but does not make it obligatory for the

prosecution to make the report substantive evidence simply because it had served a copy thereof upon the accused in pursuance of the said s 399(1). The object of dispensing with the calling of the categorized persons as witnesses was probably to avoid the expenses, delay or inconvenience which would be caused if they were to testify in court in person. But even then, such persons would have to be called as witnesses if required by court or if needed, upon due notification, by the accused. In this case presently under appeal, an important point to note is that the prosecution decided to call PW3 rather than relying on his report exh P11, which it had served, as substantive evidence. Had the prosecution persisted to act under the said s 399(1) and tendered the report in court to establish that part of its case, then the rule might apply that the contents of the report must be proved by the report itself, and not by parol evidence; but that was not what the prosecution did. In fact, the prosecution called PW3, the maker of the report; by so doing, the prosecution not only had complied with the best evidence rule — the rule that the best evidence of which the subject (or the nature of the thing) is capable ought to be produced — but had also afforded the appellant the benefit of cross-examining PW3, an opportunity of which erstwhile counsel for the appellant had indeed availed himself in this case.

Furthermore, we saw nothing improper in the production of the report (exh P11) by PW3 as maker thereof in the course of his giving evidence in court in this case. A perusal of the appeal record (pp 10-17) would reveal that the primary evidence of PW3 came from his oral testimony.

In point of law, where a maker of a report is called as a witness, there is nothing to prevent him from tendering his report for the purpose of corroborating his own evidence though, as we have stated earlier, that was not the purpose for which exh P11 was tendered by PW3 in this case. In *Saw Thean Teik v. R*, which dealt with s 427 of the Criminal Procedure Code (Cap 21) which was in *pari materia* with s. 399 of our present CPC (except for one category of persons in sub-s (2)), Wilkinson J said (at p 125):

> When a Medical Officer is giving oral evidence then, of course, any notes which he may have made at the time of his examination, he can refer to refresh his memory. Moreover, if his report is made at about the time when his examination took place, the report could be put in, not as primary evidence of its contents but to corroborate the oral evidence already given under s 157 of the Evidence Ordinance.

And (at p 126):

> Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence. Clearly, if the witness is in the witness box, the best evidence is his oral evidence as to what he saw or discovered (see s 60 of the Evidence Ordinance). Where witnesses of this kind are brought to court, their reports should only be used, if at all, either to refresh memory or as corroboration.

Similarly in *PP v. Lam Peng Hoa & Anor*, Kang Hwee Gee J, applying *Saw Thean Teik v. R*, said (at p 412):

> It is trite law that if a chemist is called as a witness to testify on matters pertaining to his analysis of the drug, the chemist report prepared by him would not be admissible, save that it may be tendered not as substantive evidence of its contents, but as corroboration of his oral evidence in court under s 157 of the Evidence Act.

[26] It is clear from the above that the prosecution may rely on the oral evidence of the chemist notwithstanding the fact that the chemist report has been admitted in court as an evidence pursuant to s. 399 of the CPC. In such a situation, the oral testimony of the chemist will constitute the best evidence to support the prosecution's case.

[27] Now reverting back to the present case, the scenario here is no different from *Muhammed Hassan v. Public Prosecutor (supra)* in that the prosecution had called PW3 to testify and also tendered P9 pursuant to s. 399 of the CPC. In her oral evidence, PW3 testified that the substance that she was asked to analyse was homogenised before she carried out the test. She was cross-examined on this issue, but she stood steadfast and consistent in stating that the substance was indeed homogenised before she carried out the test. No doubt the words used in P9 may give rise to two possible interpretations, but we are unable to circumscribe ourselves to the interpretation urged upon us by learned counsel for the respondent. In our considered view, words employed in P9 does not affect the propriety of the whole report when it is viewed against the testimony of PW3. That alone cannot be a basis for the court to discredit PW3's evidence. We must not lose sight of the fact that the oral evidence of PW3 constitutes substantive or the best evidence. The report in P9 is the secondary evidence tendered to corroborate the oral evidence of PW3.

[28] In our judgment, we are satisfied that PW3 had explained in her oral testimony the test that she had conducted on the material she had analysed which formed the subject matter of the charge. PW3 had clearly stated in her oral testimony in no uncertain terms that the substance sent to her for analysis had been homogenised before the analysis was done. In our judgment, this is sufficient. It is not necessary for a chemist whilst testifying in court to state in *verbatim* the contents of the chemist report or for that matter to state that homogenisation was done before the analysis in every case. Accordingly, no set formula is called for suffice that when the evidence of the chemist is taken as a whole, it makes it abundantly clear that proper procedure is adhered to by the chemist when the substance is sent for analysis.

[29] Finally, we have read the grounds of judgment of the High Court and found that the evidence against the respondent was overwhelming to support the charge, and all other ingredients of the offence had been successfully proven by the prosecution beyond reasonable doubt. The respondent failed to cast any reasonable doubt on the prosecution's case. We accordingly set aside the orders of the Court of Appeal and restored the orders of the High Court. We reinstated the conviction of and the death sentence imposed upon the respondent. We are of the view that the conviction in this case is safe.